No. 85-718

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

AMERICAN METHYL CORPORATION, PETITIONER

v.

MOTOR VEHICLE MANUFACTURERS ASS'N OF THE UNITED STATES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in setting aside as arbitrary and capricious a decision by the Administrator of EPA granting a waiver permitting the introduction of a new fuel or fuel additive.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 768 F.2d 385.

JURISDICTION

The judgment of the court of appeals (Pet. App. 37a-38a) was entered on July 26, 1985. A timely petition for rehearing was denied on September 18, 1985 (Pet. App. 55a). The petition for a writ of certiorari was filed on October 25, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the 1970 Amendments to the Clean Air Act, Congress authorized the Administrator of the Environmental Protection Agency to control or prohibit the manufacture,

introduction into commerce, or sale of any fuel or fuel additive either to protect public health and welfare or to guard against impairment of emission control devices or systems. § 211(c), 42 U.S.C. 7545(c). Before taking action to control or prohibit a fuel or fuel additive in order to protect emission control devices, the Administrator is required to hold a public hearing and consider available scientific and economic data, including a cost-benefit analysis of alternative emissions control systems. § 211(c)(2)(B), 42 U.S.C. 7545(c)(2)(B). The Administrator must conclude that the prohibition will not cause the use of other fuels or additives of equal or greater threat to health or welfare. § 211(c)(2)(C), 42 U.S.C. 7545(c)(2)(C).

In 1977, Congress amended the Clean Air Act to afford the Administrator additional power over the introduction of new fuels or additives that might damage emission control systems. Section 211(f)(1), 42 U.S.C. 7545(f)(1), declared it unlawful, after March 31, 1977, to introduce into commerce a fuel or fuel additive that is not substantially similar to fuels used for emissions testing of prototype vehicles for certification under the Act (see Section 206(a), 42 U.S.C. 7525(a)). Section 211(f)(4) empowered the Administrator to waive this prohibition upon a determination that the applicant for a waiver "has established that such fuel * * * will not cause or contribute to a failure of any emission control device * * * to achieve compliance by the vehicle with the emission standards * * * to which it has been certified." If the Administrator has not acted to grant or deny a waiver within 180 days, the waiver shall be treated as granted. *Ibid.* Section 211(f)(5) provides that no court may stay a waiver granted by the Administrator under Section 211(f)(4) pending judicial review.

2. Petitioner American Methyl Corporation[1] manufactures a proprietary ingredient for use in a motor vehicle fuel called "Petrocoal," which consists of a blend of unleaded gasoline, methanol, and other alcohols. On February 20, 1981, petitioner applied for a Section 211(f)(4) waiver for Petrocoal. On September 28, 1981, EPA granted a conditional waiver for Petrocoal. Pet. App. 39a-54a; 46 Fed. Reg. 48975 (1981).[2] The waiver conditions included, inter alia, limits on the concentrations of methanol and of total alcohols in the finished fuel.

On December 4, 1981, respondents Motor Vehicle Manufacturers Association of the United States (Manufacturers Ass'n) and the General Motors Corporation filed petitions to review the grant of the waiver in the court of appeals. Petitioner intervened as a respondent in those actions. On that same date, the Manufacturers Ass'n also filed a petition for administrative reconsideration of the waiver. Lengthy negotiations between the parties to the administrative and legal proceedings ensued. On February 22, 1983, the Manufacturers Ass'n supplemented its administrative petition with additional technical data concerning evaporative emissions of alcohol-blend fuels such as Petrocoal (Pet. App. 6a). On May 2, 1983, EPA requested public comment on the supplemented administrative petition, 48 Fed. Reg. 19779, and on March 28, 1984, the Administrator published a notice proposing revocation of the Petrocoal waiver, 49 Fed. Reg. 11879.[3] Subsequently, counsel for petitioner

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[1]American Methyl Corporation was previously called Anafuel Unlimited.

[2]Petitioner and EPA had agreed to extend the 180-day deadline (Pet. App. 41a).

[3]In January 1984, in its brief in the court of appeals in the instant case, EPA stated that it had committed at least one fundamental error in granting the waiver on the original record, and it asked the court to remand the case for reconsideration by the agency.

sought and obtained a letter from the General Counsel of EPA, dated June 8, 1984, expressing the opinion that the agency had the authority to reconsider and potentially to revoke the Petrocoal waiver.

3. While the instant case was pending, petitioner filed petitions for review from both the March 28, 1984, notice of proposed revocation and from the June 8, 1984, General Counsel's letter. The court of appeals denied EPA's motion to dismiss these petitions, stayed administrative proceedings, and heard the petitions on a expedited schedule. On December 4, 1984, the court of appeals ruled in favor of petitioner. *American Methyl Corp.* v. *EPA*, 749 F.2d 826 (D.C. Cir.). The court held that, in the circumstances presented, the Administrator was not empowered to revoke a waiver issued pursuant to Section 211(f) of the Clean Air Act, but rather was required to use the rulemaking provisions of Section 211(c) to control or prohibit the fuel that had already been the subject of a waiver. Accordingly, the court of appeals set aside the Administrator's notice proposing to revoke the Petrocoal waiver and remanded the case "for further proceedings under section 211(c), if the Administrator deems them desirable" (749 F.2d at 840).

4. Subsequently, the court of appeals heard the instant case involving the petitions for review challenging the Administrator's original grant of the waiver for Petrocoal. On July 26, 1985, the court granted those petitions for review although it agreed with EPA's position in part (Pet. App. 1a-36a). The court agreed with EPA that the Administrator may grant a waiver if he determines that the use of the fuel or additive does not cause or contribute to the failure of a vehicle to achieve compliance with emissions standards, even if the waiver would result in some increase in emissions (*id.* at 9a-11a). The court further agreed with EPA that actual, long-term durability testing is not always necessary to determine whether use of a fuel or additive would cause a

vehicle to exceed emissions standards over its useful life (five years or 50,000 miles) (*id.* at 11a-16a). The court stated that "[c]lear evidence before the EPA may allow it to conclusively rule out the possibility of long-term deteriorative effects, thus making the EPA's Deteriorated Emissions Test sufficient and obviating the need for actually conducting costly and time-consuming 50,000-mile durability tests" (*id.* at 15a (footnote omitted).

The court granted the petitions for review, however, because it concluded that the Administrator lacked a rational basis for finding that Petrocoal would not contribute to a vehicle's failure to comply with emission standards over its useful life (Pet. App. 16a-32a). First, the court found that EPA's decision not to require 50,000-mile durability testing in this case was not sufficiently supported by any clear evidence that Petrocoal would not have long-term deteriorative effects (*id.* at 16a-23a). Second, the court ruled that the decision to grant a waiver despite the failure of Petrocoal to pass the Deteriorated Emissions Test for nitrogen oxides was not accompanied by a reasoned explanation of why the established test criteria were not determinative (*id.* at 28a-31a). Finally, the court agreed with EPA's concession (see note 3, *supra*; Pet. App. 24a) that the administrative record apparently did not support a finding that the test results actually obtained for Petrocoal were based on fuels meeting the maximum concentration limits specified in the waiver (*id.* at 23a-28a). Accordingly, the court of appeals vacated the Administrator's decision granting the waiver and remanded to the Administrator for renewed consideration of whether a waiver should be granted under Section 211(f) (*id.* at 36a).

ARGUMENT

The issue addressed in the decision of the court of appeals is whether the administrative record supports the decision reached by the Administrator of the EPA in this case. The

holding that it does not is a factbound one that does not conflict with any decision of another court of appeals or of this Court. Accordingly, there is no reason for review by this Court of the court of appeals' decision remanding this case to the agency for further consideration.

Petitioner's primary claim (Pet. 11-14, 18-21) is that the action of the court of appeals in vacating the Section 211(f) waiver granted for Petrocoal is inconsistent with the earlier court of appeals ruling that the EPA Administrator lacked power to revoke a waiver, *American Methyl Corp.* v. *EPA, supra*. In the earlier case, however, the court found that the Administrator sought to revoke the waiver based on new information submitted two years after the waiver originally had been granted and specifically noted that "the Administrator point[ed] to no defects in his original approval of the Petrocoal waiver" (749 F.2d at 838). In these circumstances, the court found that Congress had intended that the Administrator initiate rulemaking proceedings pursuant to Section 211(c) in order to control or prohibit the fuel. 749 F.2d at 834-840.[4] In the instant case, by contrast, the court of appeals simply exercised its normal function of reviewing administrative action on the record created by the agency. Finding the action of the Administrator here "arbitrary and capricious," it set aside the decision of the Administrator and remanded for further proceedings. See, *e.g.*, *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973).[5]

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[4]The court there did recognize "an inherent power" of agencies to correct their mistakes by reconsidering decisions within the period for taking an appeal. 749 F.2d at 835. It also suggested that EPA would be able to revoke a waiver obtained by means of fraud or misrepresentation. *Id.* at 834 n.51.

[5]The court of appeals found it unnecessary to decide here whether review lay under the Administrative Procedure Act, 5 U.S.C. 706(2), or under the special provisions for judicial review of the Clean Air Act, 42 U.S.C. 7607(d)(9), because the standards for judicial review are the same. Both provisions embody the arbitrary and capricious standard. See Pet. App. 8a n.6.

Petitioner's claim that the court of appeals lacked power to vacate the decision granting the Section 211(f)(4) waiver boils down to an assertion that waiver actions by the Administrator are unreviewable. This contention is without foundation. There is a presumption of judicial review of final agency action unless Congress either explicitly, or through the statutory scheme it enacted, precludes judicial review. *Block* v. *Community Nutrition Institute*, No. 83-458 (June 4, 1984), slip op. 5. There is no such preclusion here; rather, Congress clearly intended that rulings on waivers under Section 211(f)(4) would be subject to judicial review. Indeed, Congress directly addressed that subject by modifying the normal incidents of judicial review by precluding the courts from staying a waiver decision pending review. See Section 211(f)(5), 42 U.S.C. 7545(f)(5). In light of Congress's specific attention to this issue, it is plainly inappropriate to infer a greater and different restriction on the normal powers of a reviewing court. Accordingly, the court of appeals was empowered to vacate the waiver decision upon its determination that the Administrator "acted arbitrarily, capriciously, and abused her discretion" (Pet. App. 36a).

There is no inherent inconsistency between the two court of appeals decisions concerning the Petrocoal waiver. One concerns the proper mechanism to be used by the agency itself to revoke a waiver on the basis of new information. The decision here concerns the action to be taken by a reviewing court upon concluding that the original grant of a waiver was arbitrary and capricious. Indeed, the difference in the relief at issue in the respective decisions further shows the lack of any legal inconsistency.

Petitioner also asserts (Pet. 14-18) that the court of appeals' decision is inconsistent with this Court's rulings in *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983), and *Vermont*

Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 (1978). Petitioner claims that the court of appeals impermissibly imposed an additional procedural requirement on EPA in finding that the agency acted arbitrarily and capriciously in granting a waiver despite Petrocoal's failure of the Deteriorated Emissions Test for oxides of nitrogen. We do not agree that the court of appeals has imposed any new or additional procedural obligation on the agency. The EPA has used the Deteriorated Emissions Test in considering Section 211(f)(4) waivers in the past, and the court of appeals' decision thus reaffirms the agency's existing procedures. Here, the court of appeals simply found that the agency did not adequately explain its departure from existing criteria when it granted Petrocoal a waiver despite failure of that test (Pet. App. 30a-31a). Compare *Motor Vehicle Manfacturers Ass'n* v. *State Farm Mutual Automobile Ins. Co.*, 463 U.S. at 57 (holding agency abandonment of passive restraint regulations invalid for lack of "reasoned analysis" and adequate explanation).[6]

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[6]We note that the agency's treatment of Petrocoal's failure of the Deteriorated Emissions Test was only one of several reasons given by the court of appeals for finding the waiver decision arbitrary and capricious (see Pet. App. 16a-28a). Thus, even if this Court were to find that the appellate court overstepped the bounds of judicial review on this particular point, the judgment below would not be altered.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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